UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MANNING, Petitioner and Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, and LAWRENCE E. WILSON, Warden, et al., Respondents and Appellees.	) N

APPELLEE'S BRIEF

THOMAS C. LYNCH,
of the State of

ALBERT W. HARRIS,
Assistant Attor

ROBERT R. GRANUCC
Deputy Attorney

6000 State Buil
San Francisco,
Telephone: 557

Attorneys for Res

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APPELLEE'S BRIEF

JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

On June 12, 1964, a preliminary hearing was held in the Los Angeles Municipal Court on a complaint which charged the appellant, David Manning, petitioner below, with the felony offense of robbery, a violation of section 211 of the California Penal Code (RT 13).[1/]

1. "RT" refers to the reporter's transcript of the hearing in the district court.

As a result of that hearing appellant was bound over to the Superior Court of Los Angeles County where he was arraigned and entered a plea of not guilty (RT 14-15). On August 5, 1964, petitioner again appeared in the Superior Court, represented by privately retained counsel and changed his plea to guilty (RT 15, 82-83). On September 4, 1964, petitioner was arraigned for judgment. Probation was denied and he was sentenced to state prison for the term prescribed by law.

Petitioner did not appeal but instead subsequently applied to the appropriate state courts for relief on habeas corpus.

B. Proceedings in the federal courts.

On September 1, 1965, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1-33).[2/] On September 9, 1965, an order to show cause was issued (CT 35), and on September 29, 1965, appellee, respondent below, filed a return to the order to show cause and points and authorities in opposition to habeas corpus (CT 36). On or about October 14, 1965, appellant filed a traverse (CT 44).

On October 21, 1965, Judge Zirpoli of the District Court appointed counsel to represent appellant

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2. "CT" refers to the clerk's transcript, filed in this Court as Volume One of the Transcript of Record.

and set the matter for an evidentiary hearing. That hearing was conducted on November 12, 1965.

On October 31, 1966, Judge Zirpoli filed his opinion and order denying the writ (CT 50).

On November 15, 1966, appellant filed a notice of appeal (CT 61), and on November 17, 1966, Judge Zirpoli granted him leave to proceed in forma pauperis and issued a certificate of probable cause (CT 57, 60).

STATEMENT OF THE FACTS

The evidence supporting the charge of robbery to which petitioner pleaded guilty in the Superior Court of Los Angeles County is set forth in the reporter's transcript of the preliminary examination, a copy of which was introduced in evidence at the hearing before Judge Zirpoli (Pet. Exh. 1; RT 13). At that preliminary hearing Sergio Valdez, a service station attendant, testified that while he was working at his place of employment on May 23, 1964, he was robbed at gun point of $24 (PRT 2-4).[3/] He specifically identified appellant as the robber (PRT 5). Charles J. Severs, a Los Angeles County Deputy Sheriff, testified that on May 25, 1964, at approximately 9:30 a.m. at the Firestone Station he had a conversation with appellant (RT 7-8). In this

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3. "PRT" refers to the reporter's transcript of the preliminary examination.

conversation appellant freely and voluntarily confessed that he had robbed Valdez (PRT 8-10). Though appellant was represented by counsel at the preliminary hearing no objection was made to the testimony of the officer respecting appellant's extrajudicial confession.

At the hearing before Judge Zirpoli it was established that appellant had not been admonished as to his right to remain silent and his right to consult with counsel before he made his confession, and that he did not request an opportunity to consult with counsel (RT 10-11, 22-24).

William Herbert Hall, a member of the Los Angeles bar specializing in the practice in the practice of criminal law, testified that he had been retained to represent appellant in the Superior Court proceedings (RT 82-83). Mr. Hall testified that he advised appellant to plead guilty because of the overwhelming weight of the evidence against him, including the confession, although he realized from his experience that a confession was always subject to challenge in a trial court (RT 83-84, 89). Mr. Hall had read a summary of the opinion in Escobedo v. Illinois, 378 U.S. 478 (1964), prior to the time appellant entered his guilty plea (RT 91).

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APPELLANT'S CONTENTION

Appellant contends that the district court erred in denying the writ because his confession was obtained in violation of the Escobedo rule.

SUMMARY OF RESPONDENT'S ARGUMENT

Appellant's confession was not obtained in violation of the Escobedo rule.

ARGUMENT

APPELLANT'S CONFESSION WAS NOT OBTAINED IN VIOLATION OF THE ESCOBEDO RULE

Appellant's sole contention on this appeal is that his confession was obtained in violation of the rule announced in Escobedo v. Illinois, supra, and that therefore the district court erred in denying him a writ of habeas corpus. In its opinion, the district court explicitly held that Escobedo was not applicable to this case because petitioner had not requested an opportunity to consult with counsel during his interrogation.

We submit that under Johnson v. New Jersey, 384 U.S. 719 (1966), the district court was manifestly right. The following language from Johnson v. New Jersey makes it absolutely clear that a request for counsel is an essential element for the application of the Escobedo rule:

"Apart from its broad implication, the

precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,

> '[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect, has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . .' 378 U. S., at 490-491.

Because Escobedo is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which Escobedo was decided.

"As for the standards laid down one week ago in Miranda, if we were persuaded that they

had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of Escobedo, however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in Miranda, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966." Johnson v. New Jersey, 384 U.S. at 733-734.

CONCLUSION

From the record, it is obvious that petitioner pleaded guilty in the Superior Court because he was confronted with overwhelming evidence of guilt and hoped to obtain a lesser sentence (RT 83). Even if Escobedo were applicable to this case the voluntary nature of appellant's plea, entered upon the advice of experienced and competent counsel would foreclose consideration of this issue on habeas corpus. See Wallace v. Heinze, 351 F.2d 39 (1965). In any event the clear holding of Johnson v. New Jersey completely undercuts petitioner's

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Escobedo argument, the only argument he had in support of his petition for habeas corpus. Therefore, we respectfully submit that the order denying the writ should be affirmed.

Dated: March 8, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

ROBERT R. GRANUCCI
Deputy Attorney General

Attorneys for Appellees

RRG:pp

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules, 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: March 8, 1967

ROBERT R. GRANUCCI
Deputy Attorney General